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No. 02-362

In the

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,

Petitioner,

v.

CRIS BONACORSI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Ohio Supreme Court issues a decision holding that a party is not entitled to summary judgment under Ohio Rule of Civil Procedure 56(E), Ohio Rule of Evidence 602 and Ohio case law, because it relied on an affidavit based on hearsay, rather than personal knowledge. Should this Court now exercise its discretionary review over that state law decision?

2. Both this Court and the Tenth Circuit Court of Appeals hold that federal preemption is triggered by proof of actual federal funding, i.e. expenditure of federal funds. Is a motion for summary judgment based on preemption properly denied when the movant fails to support it with competent, undisputed evidence of the expenditure of federal funds?

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STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Wheeling & Lake Erie Railway Company ("the Railroad") seeks to have this Court set aside a jury verdict and finding of negligence against it for Respondent Cris Bonacorsi's life threatening injuries, including the loss of his leg. Bonacorsi sustained these injuries on July 13, 1996, when his motorcycle collided with the Railroad's speeding locomotive at a rural crossing near Kent, Ohio, where dense trees and shrubbery blocked the view of approaching trains (the "Howe Road crossing").

The Howe Road crossing was marked with a yield sign and a $135 crossbuck sign installed as part of an experimental research project involving passive grade crossings throughout Ohio. The research was undertaken to compare the effectiveness of an experimental red and white crossbuck with a reflectorized yield sign, originally designed by Conrail, but now known as the "Buckeye" crossbuck, against a standard crossbuck with reflectorized tape on the pole. The signs were installed randomly and without regard to crossing conditions, so as to eliminate all variables other than the design of the sign. Even numbered crossings received the experimental Buckeye crossbuck, and odd numbered crossings -- including the Howe Road crossing -- received a standard crossbuck. As of the filing date of this Brief, the research has yet to be completed.

At the point of approach along Howe Road where drivers should be able to see 260 feet of unobstructed track, according to traffic safety engineering guidelines, only 28 feet of track was visible to approaching motorists because of the obstructing vegetation. Because of these sight

obstructions, Cris Bonacorsi approached the Petitioner's Howe Road crossing unable to see a coming train. Nor could he hear the train because Petitioner's engineer failed to sound the horn in the time, manner and distance required by Ohio statute and Petitioner's own operating procedures.[1]

When Bonacorsi first became aware of the train, it was less than an engine length from the crossing, traveling in excess of the federal track speed limit. (Had the train not been speeding, the accident would never have occurred).[2] Bonacorsi had insufficient warning of the train to avoid sliding into one of the front wheels of the locomotive as it entered the crossing. The locomotive tore off his leg, dragged him 100 yards down the tracks and caused his near fatal injuries.

Less than a month later, another accident occurred at the crossing, the fourth in less than two years. The Ohio Public Utilities Commission ordered the Howe Road crossing upgraded, and flashing lights and gates were installed at the crossing.

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[1]Under Ohio Law, engineers are required to sound the train horn at least 1320 feet from the crossing and continued to sound it at frequent intervals until the locomotive has passed through the crossing. Ohio Revised Code §4999.04. App. 4a. Here, the conductor testified that the horn may not have been sounded until the train was 880 feet from the crossing. The evidence further showed, as confirmed by the train's event recorder, that the crew failed to provide the required 4 second blast of the horn as they entered the final approach to the crossing when the train was still hidden behind the trees, a violation of Petitioner's operating procedures.

[2]According to the train's event recorder, the train was traveling 26 mph instead of the 25 mph posted speed limit as it approached and entered the hazardous crossing. By contrast, Bonacorsi's speed was 10 mph under the speed limit at the point of impact.

At trial, multiple claims were submitted to the jury. In addition to a claim based on the failure to install lights and gates at an ultra hazardous crossing, separate state law claims were presented based on negligent train operation for Petitioner's failure to exercise ordinary care, specifically, (1) its failure to maintain a lawful speed, (2) failure to maintain a proper lookout and (3) failure to properly sound the horn. Any or all of these claims may have formed the basis for the jury's verdict.[3]

B. Petitioner's Failure to Prove Preemption

Petitioner was provided three separate opportunities to move for summary judgment or reconsideration of summary judgment on the issue of preemption of Respondent's claims based on the failure to install lights and gates. (It was undisputed that these motions did not address the negligent train operation claims which would remain for trial.) In addition, the trial court gave Petitioner the opportunity to present evidence of federal funding at a preemption hearing held shortly before trial. But Petitioner's trial counsel admitted he had none:

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[3]When asked for the basis of its finding of negligence against the railroad, the jury wrote in its interrogatory answer: "two prior accidents; railroad did not initiate change in signals and signs. *Proving [a lack of] ordinary care.* Plaintiff unable to see train." (Emphasis added). Under Ohio law, jury interrogatories are to be construed in favor of upholding the verdict. *Becker v. BancOhio National Bank*, 17 Ohio St.3d 158 (1985); *Klever v. Reid Bros. Express, Inc.*, 151 Ohio St. 467, 474 (1949); A verdict may be set aside and judgment entered on the interrogatory only when it is "*impossible*" to reconcile the interrogatory with the general verdict. *Shaffer v. Maier*, 68 Ohio St.3d. 416, 423-424 (1994)(J. Ford, Moyer and Wright, dissenting)(Emphasis by the Court).

> Now as I stand here today, I am not prepared to present evidence to show that the dollars that were spent at Howe Road, in fact flowed from the federal government other than the fact that by implication of everything that's here, that's what happened.

(Tr. of Proceedings, June 3, 1999, pp. 80-90). Summary judgment "by implication" is not the standard under Ohio law.

This admission stands in stark contrast to the record before this Court in *Norfolk & Southern Railway v. Shanklin*, 529 U.S. 344 (2000). First, in *Shanklin*, there was an agreement between the State of Tennessee and the railroad, which had been approved and executed by the FHWA. Here, only a contract between the State of Ohio and Petitioner was introduced below. In addition, the Court in *Shanklin* relied on the application for funding and documents entitled "Federal-Aid Project," "Final Inspection of Federal-Aid Project," and "Certification Acceptance Final Inspection Report." (Ohio S.Ct. Supp., pp. 154, 157). Most importantly, the "Final Inspection" showed the date of actual disbursement of FHWA funds to the TDOT long before Shanklin's accident. The lower right hand corner of the FHWA Final Inspection form was also marked "**Paid**," indicating that the project had been completed and federally funded. (Ohio S.Ct. Supp., p.155).

Petitioner produced no such evidence in this case. Instead, it offered an affidavit of a railroad employee, whose testimony was based on a contract attached to and incorporated into his affidavit between the Railroad and the state. However, the applicability of that contract to the Howe Road crossing was disputed by the terms of the

contract itself; the contract applied to work completed by 1993, and the crossbuck was not installed at the Howe Road crossing until 1995. The Railroad then relied on the affidavit of a state employee, Susan Kirkland, which purportedly was based on personal knowledge, but which she later conceded at deposition was based on what others told her. Petitioner's characterization of the Kirkland affidavit as being "uncontradicted" is not true. It was contradicted by Kirkland's own deposition.[4]

After Petitioner's motions for partial summary judgment were denied, and the case proceeded to trial, Petitioner abandoned its preemption defense. Petitioner failed to present any witnesses on the issue, and failed to introduce into evidence any admissible documents on preemption or federal funding. The Railroad never moved for directed verdict on federal preemption, nor did it request any jury charges on the issue.

Eight months after the verdict, while this case was on appeal, *Shanklin* was decided. Petitioner tried to resurrect a preemption defense. But by then, the paucity of the record was apparent: there was no competent evidence on which a finding of federal funding could be made to support summary judgment based on federal preemption.

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[4]Petitioner is also incorrect in stating that the trial court denied Respondent's motion to strike Kirkland's affidavit. It was never ruled on, and instead the trial court granted leave for Respondent to take Kirkland's deposition. Once that deposition was taken and filed, the court then denied summary judgment.

REASONS FOR DENYING THE PETITION

I. A STATE COURT DECISION THAT AN AFFIDAVIT MUST BE BASED ON PERSONAL KNOWLEDGE, RATHER THAN HEARSAY, UNDER STATE EVIDENCE RULES AND STATE RULES OF PROCEDURE DOES NOT WARRANT THIS COURT'S REVIEW.

In ruling on Petitioner's motion for summary judgment, the Ohio Supreme Court did not impose any "special" or "heightened evidentiary standards." Rather, it applied well-settled rules of Ohio civil procedure and Ohio evidence that uniformly govern summary judgment practice in Ohio state courts. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314 (2002). Since the case was decided solely on state grounds, the federal issue was never decided.[5] *Id.*, Pet. App. A, 11a, Par. 29. The Ohio Supreme Court did not reach the issue of federal preemption, nor any other federal issue. The decision is therefore not subject to review by this Court.

In reaching its decision, the Ohio Supreme Court set forth the applicable state procedural and evidentiary standards as follows:

> Civ R. 56(E) requires that affidavits supporting motions for summary judgment be

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[5]Bonacorsi argued that while *Shanklin* allowed for preemption under the Crossings Program, because crossing conditions under that program are specifically to be considered as part of the funding and approval process, those same considerations do not apply to an experimental research program, like the present one, where signs were randomly placed at crossings without consideration of specific crossing conditions.

> made on personal knowledge. *State ex. rel. Cassels v. Dayton City School Dist. Bd. Of Ed.*, 69 Ohio St. 3d 217, 223, 631 N.E. 2d. 150 (1994). For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. *Id.*; Evid. R. 602. "Personal knowledge" is "[k]nowledge gained though first-hand observation or experience, *as distinguished from a belief based on what someone else has said.*" Black's Law Dictionary (7th Ed. Rev. 1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the sense of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.") (Emphasis added).

Pet. App. A, 10a, Par. 26.

These standards are similar to their federal counterparts. Ohio Civ. R. 56(C) provides that summary judgment will only be granted when depositions and affidavits show that there are no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Ohio Evid. Rule 602 provides that a witness may only testify to matters of personal knowledge.[6] The Ohio Supreme Court found that these requirements were not met due to a conflict between Susan Kirkland's affidavit and her later deposition testimony on the dispositive issue of federal funding:

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[6]Ohio Rule of Civil Procedure, Rule 56, and Ohio Rule of Evidence, Rule 602, are reprinted in App. 1a, 3a.

> Kirkland explicitly states in her affidavit that she had 'personal knowledge' that federal funds were used to install crossbuck signs at all Ohio railroad crossings marked with passive warning devices. In her deposition, however, Kirkland testified that ODOT [Ohio Department of Transportation] was responsible for handling federal funds, that she did not work for ODOT, *and that her knowledge that federal funds were used to install signs at railroad crossings came from other people.*
>
> After reviewing Kirkland's deposition testimony we find that she clearly lacked the personal knowledge required by Civ. R. 56(E) to support the statements in her affidavit regarding federal funding. Consequently, we find that W&LE failed to prove that federal funds paid for the installation of the Howe Road crossbuck sign. Because, at a minimum, federal funding is required to trigger preemption, we hold that W&LE's motion for partial summary judgment should not have been granted." (Emphasis added).[7]

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[7]Contrary to her affidavit, Kirkland testified at deposition that she had no personal knowledge regarding the receipt of federal funding for the Buckeye Crossbuck Program. (Kirkland Depo., p. 26, lines 12-16; p. 30, lines 9-12; p. 31, lines 15-18, S. 128, 132, 133). She admitted her knowledge regarding the receipt of federal funding for the project was based on second-hand hearsay, not personal knowledge. (*Id.*, p. 26, lines 12-16; p. 30, lines 9-12; p. 31, lines 15-18). At her deposition she conceded her "knowledge of funds spent at that location would come from other people who actually handled the funds." (*Id.*, pp. 13-15).

Pet. App. A, 10a-11a, Pars. 27-28.

The court further noted that Petitioner failed to offer any documentary evidence of federal funding. This included Petitioner's failure to produce the alleged agreement with the federal government requiring the use of federal funds for the crossbucks. Pet. App. A., 11a, fn.10. The contract that provided for the installation of the Buckeye Crossbuck was a contract between a state agency, the Ohio Department of Transportation, and the Railroad. It provided that the state was to reimburse the Railroad. No branch of the federal government was a party to the agreement. Thus, the contract also established that employees of ODOT would be the ones knowledgeable of the nature of funds used to install crossbucks under the agreement, not an employee of the Ohio Rail Commission like Kirkland. The Railroad failed to provide any evidence from an ODOT employee or from the federal government on the issue of federal funding.

Petitioner Railroad continues to argue that Kirkland's affidavit is governed by the law in *State ex rel Corrigan v. Seminatore,* 66 Ohio St.2d 459 (1981), but ignores the first words of the syllabus:

> *Unless controverted by other evidence*, a specific averment that an affidavit pertaining to a business of a board is made upon personal knowledge of the affiant or chairman satisfies the Civ. R. 56 (E) requirements that the affidavit supporting an opposing motion for summary judgment showed that the affiant is competent to testify to the matters stated. (Emphasis added.)

Unlike the situation in *Seminatore,* the *Bonacorsi* case involved a conflict between an affidavit and deposition testimony.[8] The subsequent deposition testimony of Kirkland discredits and impeaches her affidavit.

When there is a conflict between an affidavit and deposition testimony, a party is unable to establish the absence of genuine issues of material fact. The Ohio Supreme Court's ruling is consistent with its prior ruling in *Turner v. Turner*, 67 Ohio St.3d 337, Syllabus, Par. 1 (1993), that summary judgment is improper where an affidavit in support of a motion for summary judgment is inconsistent with deposition testimony, as well as established Ohio precedent on Civ. R. 56 and affidavits. See e.g., *State ex rel Seminatore, supra.*; *Turner v. Turner, supra*; *State ex rel Bd. of Commr. of Millcreek Metropolitan Park Dist. v. Tablack,* 86 Ohio St.3d 293, 297 (1999) (a party erroneously relies on affidavits not based on personal knowledge); *State ex rel Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 223 (1994) (a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter).

Morever, in considering summary judgment, an Ohio state trial court must resolve all doubts and construe the evidence against the moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d, 7-12 (1983). This is exactly what the Ohio Supreme Court did. The Ohio Supreme Court's decision is also consistent with this Court's

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[8]This case is therefore distinguishable from *Flood v. CSX Transp., Inc.*, No. C-2-99-1186, slip op. (S.D. Ohio July 12, 2001), cited by Petitioner (Petition, p.16). In *Flood*, unlike the situation here, Kirkland was not deposed and therefore her affidavit was not controverted by her deposition testimony.

precedents which acknowledge the stringent standard for finding preemption and the presumption against it. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 668 (1993); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984). It also is consistent with this Court's requirement that the party claiming preemption has the burden of demonstrating its existence. *Silkwood,* 464 U.S. at 255.

Kirkland's deposition testimony established that the assertion of personal knowledge of federal spending in her affidavit was not true. Based on Petitioner's failure to set forth competent, undisputed evidence, summary judgment was properly denied. Once summary judgment is denied, the party then proceeds to trial with the issue still in the case. At trial, Petitioner was obligated to produce competent evidence of federal funding. Unable to garnish the evidence it needed, or believing the issue was one it could not win, Petitioner abandoned its preemption defense at trial, and offered no such evidence. Indeed, Petitioner's counsel conceded it lacked such evidence at the hearing held shortly before trial on preemption. ("I am not prepared to present evidence to show that the dollars that were spent at Howe Road, in fact flowed from the federal government.") (Tr., June 3, 1999, pp. 80-90).

Issues involving local state rules of evidence and procedure are outside this Court's review. Thus, a petition for certiorari will not be granted to review a determination that is a matter of local law such as rules of evidence prevailing in state courts. *Griffen v. United States,* 336 U.S. 704, 709 (1949). Formation of rules of evidence is a matter purely of local law to be determined by the highest local appellate court. *Griffen,* 336 U.S. at 717. See also, *Israel v. McMorris*, 455 U.S. 967 (1982) (petition for writ of certiorari denied when issue involves a state rule of

evidence).

Nor will this Court grant certiorari when state procedural rules are the basis for the state court's decision. *Duncan v. Tennessee,* 405 U.S. 127 (1972). The failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground for this Court to deny review, so long as the state has a legitimate interest in enforcing its procedural rule. *Michigan v. Tyler*, 436 U.S. 499, 512, fn. 7 (1978). The Railroad in this case does not claim that Ohio Civ. R. 56 fails to serve a legitimate purpose. Moreover, this Court has held that it will not entertain a claim when the state has a legitimate interest in performing its procedural rule. *Id.*

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). This rule applies whether the state law ground is substantive or procedural. *Id.* In the context of the direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Id.* When this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not effect the judgment and would therefore be advisory. *Id.* This Court is not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after this Court corrected its views of federal laws, this Court's review amounts to nothing more than an advisory opinion. *Id.*

In this case, the Ohio Supreme Court specifically stated that it was not addressing the merits of whether *Shanklin* would apply to this case and instead found that Petitioner had simply failed to meet state procedural and evidentiary requirements for prevailing on summary judgment. (Pet. App. A, 11a, Par. 29). Our dual system of government recognizes the finality of a judgment by a state's highest court on the interpretation of its own state rules of evidence and procedure, and such decisions should not be disturbed by this Court.

In similar cases, this Court has recently denied certiorari to review other state decisions in which the railroads failed to offer sufficient evidence of federal funding to support a claim for preemption. See, *Kansas City Southern Railway v. Johnson,* 798 So.2d 374, 379 (Miss. 2001), cert. denied 122 S. Ct. 43 (2001) and *Duncan v. Kansas City Southern Railway*, 773 So.2d 670, 680 (La. 2000), cert. denied 532 U.S. 992 (2001). Those decisions, like the Ohio Supreme Court's decision here, were based on state court rulings that there was a failure to meet state evidentiary requirements. Certiorari was properly denied in those cases and should be denied in this case as well. This Court should not become a court of last resort for deciding if a party has met state law evidentiary standards for summary judgment. Such "pedestrian issue[s] of evidentiary sufficiency," as Petitioner describes them (Petition, p.17), are not subject matters for this Court's review.

II. THE OHIO SUPREME COURT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE ISSUE OF FEDERAL FUNDING.

In ruling on Petitioner's request for summary judgment, the Ohio Supreme Court did not create a new standard for federal preemption, but narrowly decided the case solely on state procedure and evidence rules. Even so, its discussion of federal preemption law was consistent with this Court's precedent in *Shanklin* and *Easterwood*. Indeed, Petitioner is the one that now seeks to overturn those decisions by adopting an unworkable rule in which the pivotal issue of federal funding would no longer turn on evidence of actual funding. Instead, Petitioner would have this Court adopt a new standard where preemption occurs prematurely – "when the state commences work that is reimbursable with federal funds." (Petition, p.3).

First, this standard was already rejected by this Court in *Easterwood*, where this Court found that the commitment of federal funds alone is insufficient proof for federal preemption. Moreover, under Petitioner's rule, preemption could be invoked even if committed funds are later diverted to another project or withdrawn. It would also eliminate a critical step in the approval process. It would no longer ensure a certification with the final bill that the work is "complete, acceptable and in accordance with the terms of the agreement." (See Petition, p.23, fn.14). Petitioner seeks to impose immunity on negligent railroads with no corresponding assurance that federal funds are in fact expended or that the installed devices receive final approval.

In *Easterwood,* this Court held that the facts did not establish that federal funds "participated in the installation of the warning devices" when funds had been committed but spent elsewhere. *Easterwood*, 507 U.S. at 672. There, federal funds were allocated for the crossing, and reimbursable work begun; however, the funds were later diverted to another project when the original project was "scotched" before it was completed. *Id.* at 673-74. Thus, in *Easterwood,* where federal funds had actually been committed, but not spent, this Court held that there was insufficient proof for preemption.

Easterwood was followed and relied upon by the Ohio Supreme Court in the case of *Carpenter v. Consolidated Rail Corp.*, 69 Ohio St.3d 259 (1994). *Carpenter* was then cited by the Ohio Supreme Court in the present case in discussing the Petitioner's failure to offer evidence of actual participation of federal funding:

> "Proof of federal funding is crucial to W&LE's preemption argument because the federal regulation that covers the subject of warning-device adequacy applies only to warning devices installed with federal funds. Section 646.214(b)(3)(i), Title 23, C.F.R. (See footnote 4): *Carpenter v. Consol. Rail Corp.* (1994), 69 Ohio St.3d 259, 263, 631 N.E. 2d. 607 (Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent)"[9] (App. A., 10a, par.

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[9]In *Carpenter*, the Ohio Supreme Court refers to *Easterwood* and states:

> Apparently the [*Easterwood*] Court concluded that planning and preparation are insufficient to invoke

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The Ohio Supreme Court's ruling is consistent with both *Easterwood* and *Shanklin*. According to *Shanklin*, preemption occurs when three requirements are met: (1) the FHWA approves a crossing improvement project, (2) the improvements are actually installed and operating, and (3) federal funds participate in the crossing improvement project. *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000). As to this third element, this Court explicitly stated that preemption arises "*once the FHWA has funded* the crossing improvement and the warning devices are actually installed and operating." *Id.* at 354. (Emphasis added). Thus, under both *Easterwood* and *Shanklin*, actual funding, rather than a mere commitment to fund, is required to prove preemption.

In *Shanklin*, preemption was found to exist because, unlike here, the record contained proof that the project had been paid for with federal funds. In *Shanklin*, the FHWA had approved the project and federal funds actually accounted for 99% of the costs for the signs installed. *Shanklin*, 529 U.S. at 350. The record before this Court in *Shanklin* included a document that the federal funds were in fact "paid" and disbursed before the accident and also included a final inspection report approving the project and disbursement. (See "Certification Acceptance Final

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> preemption. Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent, and the "warning devices," as defined in Sections 646.204(i) and (j), Title 23, C.F. R. must have been installed.

Carpenter, 631 N.E. 2d at 610.

Inspection Report," Ohio S. Ct. Supp., pp. 154, 155, 157). Further, in *Shanklin*, the railroad also produced the agreement which the federal government executed obligating the use of federal funds for the project.

The lower court decisions cited by the Railroad in its Petition further support the proposition that a party must show proof of actual expenditures of federal funds before preemption will apply. Moreover, none of those cases contained factual disputes between an affidavit and deposition like that contained here that would require a denial of summary judgment. For example, in *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), cert. denied, 516 U.S. 1093 (1996), in addressing whether federal funds "participated" in the installation of the warning devices under *Easterwood,* the court recognized that "there must be *an actual, authorized expenditure* of federal funds in the installation or placement of safety devices at the particular crossing to trigger preemption." *Id.* at 562. (Emphasis added). There the evidence showed that federal funds had in fact been approved and expended years before the accident at issue.

In *O'Bannon v. Union Pac. R.R.*, 169 F.3d 1088, 1099 (8th Cir. 1999), the court found preemption based on an affidavit that the railroad *had actually received payment* for the work performed before the accident where it was "*not disputed that federal funds were part of the payment actually made.*" (Emphasis added). In *Bryan v. Norfolk & W. Ry.*, 154 F.3d 899 (8th Cir. 1998), the court recognized that the preemptive "[f]ederal regulations are applicable if federal funds have been *expended* for the installation of the warning devices at the crossing." *Id.* at 903. In that case, in support its motion for summary judgment, the railroad presented both a deposition and an affidavit that *it had been*

reimbursed by federal monies, including those for the crossing at issue. The court therefore found that "[t]his *uncontradicted* evidence demonstrates conclusively that federal funds were expended for the crossbucks at the Massas crossing." *Id.* (Emphasis added). The court noted that once federal funds *have been expended,* and those devices are installed and operating, state law negligence claims are preempted by federal regulations.

Likewise, in *Hatfield v. Burlington N. R.R. Co.*, 64 F.3d 559, 562 (10th Cir. 1995), the court found that preemption takes place when the federal government (1) commits itself through a significant event to a project to install warning devices, and (2) *expends* significant federal resources on the project. (Emphasis added). Thus, it is insufficient under the second prong merely to authorize that federal funds be spent; instead, *Hatfield* requires "the actual expenditure of federal resources of more than a casual or de minimis nature for preemption to occur." *Id.* at 562. See *Armijo v. Atchison, Topeka & Santa Fe. R. Co.*, 87 F.3d 1188, 1193 (10th Cir. 1996) (J. Ebel, dissenting). Further, in *Hatfield* the court noted that the federal government had actually *expended* funds and federal resources on the project. *Hatfield*, 64 F.3d at 563.[10]

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[10]See also, *Powers v. CSX Transp. Inc.*, 97 F. Supp. 2d 1297, 1299 (S.D. Ala. 2000) ("plaintiff *concedes*" that devices where installed "with FHWA authorization and participation of federal funds, based on an FHWA executed Federal Aid Project Agreement referencing an authorization to proceed with the project, an obligation to pay 90% of the costs and proof that the Alabama DOT had *received* nearly $25,000 from the FHWA for the project.) (Emphasis added); *McDaniel v. Southern Pac. Transp.*, 932 F. Supp. 163, 167 (N.D. Tex. 1995) (Finding preemption based on the participation of federal funds where the railroad "presented evidence that from 1977 to 1981 funds approved under Section 203 of Federal Aid Highway Act of 1976 *were expended*" in the upgrading and installation of warning devices. The evidence

Furthermore, this Court should reject Petitioner's contention that there is an alleged conflict between the Tenth Circuit's decision in *Armijo* and the present case. First, *Armijo* is distinguishable from the present case and therefore not in conflict with it. In addition, this Court granted certiorari in *Shanklin* to resolve a conflict among court of appeals on the application of the Federal Railroad Safety Act, citing to the decision *Armijo v. Atchison, Topeka & Santa Fe. R. Co.*, 87 F.3d 1188 (10th Cir. 1996). Since this Court made its ruling in *Shanklin* after consideration of that decision, that decision does not justify accepting certiorari in this case.

In *Armijo*, the court held that the financial commitment by the federal government must be such that it shows a clear federal intent to require a federally approved warning device at the crossing in question, backed up by the *actual expenditure* of federal resources of more than a casual or de minimis nature. *Id.* at 1190. The *Armijo* court held that the issue in the case was whether federal funds participated in some significant way in the installation of warning devices before the date of the accident for the crossing at issue. Significantly, there it was "clear that the federal government had reimbursed the state for the cost[s]...Therefore, prior to

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further showed that federal funds were "approved *and expended*" from 1989 to the early 1990's); *Cochran v. CSX Transp., Inc.*, 112 F. Supp. 2d 733, 737-38 (N.D. Ind. 2000) ("*it is undisputed that crossbucks were installed...almost exclusively with federal funds* under a program approved by the FHWA."); *Williams v. CSX Transp., Inc.*, 925 F. Supp. 447, 451 (S.D. Miss. 1996), *aff'd without opinion*, 139 F. 3d 899 (5th Cir. 1998) (Railroad's affidavit showed how federal funds were used in upgrading crossing. Plaintiff made no attempt to discredit the affidavit on the issue of federal funding, except to argue there existed a "similar" crossbuck before the federally funded improvements, which "falls short of creating an issue of fact with respect to whether federal funds were used in the improvements").

the time of this accident, the federal government's participation was significant enough to trigger preemption." *Id.* at 1193. Thus, there is no conflict between the Ohio Supreme Court's ruling in *Bonacorsi* and the court's ruling in the *Armijo* case.

Unlike *Armijo* and the other decisions Petitioner relies on, the Railroad here failed to prove federal funding and expenditures before Bonacorsi's accident. Without such evidence, a preemption claim must fail.

Petitioner expects federal preemption without proving federal funding. Apparently, when this case was proceeding through the trial court, Petitioner did not anticipate this Court's decision in *Shanklin*, and therefore failed to obtain the evidence needed to support summary judgment under well-established Ohio rules of procedure and evidence. Incompetent affidavits based on hearsay, rather than personal knowledge, have routinely been rejected by Ohio courts. There is nothing novel or unfair about the Ohio Supreme Court's decision to enforce these state evidentiary requirements that apply to all summary judgment motions filed in Ohio state courts. Preemption by presumption has never been the standard in Ohio or elsewhere.

Notwithstanding Petitioner's attempts to elevate this case into a matter of national importance, it remains a state law decision that does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Ohio Civ. R. 56. Summary Judgment

(A) For party seeking affirmative relief.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written

stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Adopted eff. 7-1-70; amended eff. 7-1-76, 7-1-97, 7-1-99]

Ohio Evid. R. 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

[Adopted eff. 7-1-80]

OHIO REVISED CODE 4999.04. Duties of engineer

(A) No person in charge of a locomotive shall do the following:

(1) Fail to bring the locomotive to a full stop at least two hundred feet before arriving at a crossing with another track, or proceed through the crossing before signaled to do so or before the way is clear;

(2) When approaching a grade crossing, fail to sound the locomotive whistle at frequent intervals, beginning no less than thirteen hundred twenty feet from such crossing and continuing until the locomotive has passed the crossing.

(B) Whoever violates this section is guilty of a misdemeanor of the fourth degree. If violation of this section causes physical harm to any person, whoever violates this section is guilty of a misdemeanor of the third

degree.

[Effective Date: 8-26-77]